Supreme Court, U.S.
FILED
NOV 6 1970
E. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

OCTOBER TERM 1970

No. 693

BRANIFF AIRWAYS, INC., et al.,
Petitioners,

v.

THE TEXAS AERONAUTICS COMMISSION, et al.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

Of Counsel:
CLARK, WEST, KELLER, SANDERS, AND GINSBERG,
2424 First National Bank Building,
Dallas, Texas 75202,

CLARK, THOMAS, HARRIS, DENIUS AND WINTERS,
MARY JOE CARROLL,
P. O. Box 1148,
Austin, Texas 78767,

McGINNIS, LOCKRIDGE, KILGORE, BYFIELD, HUNTER AND WILSON,
900 Congress Avenue,
Austin, Texas.

W. B. WEST, III,
EDWARD A. CLARK,
GEORGE ALLEN BUTLER,
Counsel for Petitioners.

Counsel of Record:
GEORGE ALLEN BUTLER,
2424 First National Bank Building,
Dallas, Texas 75202.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10543 — 1455 ROUND TABLE DRIVE — DALLAS — 631-3130

INDEX

	Page
I. The Supreme Court has never Addressed the Issues presented by this Case	2
II. The Issues presented are of Major Importance	
A. State Regulation of Air Transportation is Growing Rapidly	4
B. The CAB has not expressed Lack of Interest in this Case	6
Conclusion	7

Page

Alaska Service Investigation, CAB Order No. 70-7-113 (July 23, 1970) 5

Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission, et al., Civil Action No. 69-2148 (E.D. Pa.) 5

Civil Aeronautics Board v. Friedkin Aeronautics, 246 F. 2d 173 (9th Cir., 1957) 2-3

Frontier Airlines, Inc. v. Nebraska Department of Aeronautics, 175 Neb. 501, 122 N.W. 2d 476 (1963) 2

Las Vegas Hacienda, Inc. v. CAB, 298 F. 2d 430 (9th Cir., 1962), *cert. den.* 369 U.S. 885 (1962) 3

Public Utilities Commission of California v. United Air Lines, 346 U.S. 402 (1943) 2

Reg. ER-574, Part 298, 34 Fed. Reg. 7124 3

United Air Lines v. Public Utilities Commission of California, 342 U.S. 908 (1952) 2

Western Airlines v. California, 348 U.S. 859 (1954) 2

Western Airlines, Inc. v. Pacific Southwest Airlines, CAB Order No. E-19655 (1963) 3

U. S. Statutes

Federal Aviation Act of 1958 (49 U.S. Code § 1301, et seq.) 1

Miscellaneous

1968 Report of the Committee on Motor and Air Transportation, National Association of Regulatory Utility Commissioners 4

In the

Supreme Court of the United States

OCTOBER TERM 1970

No. 693

BRANIFF AIRWAYS, INC., et al.,
Petitioners,

v.

THE TEXAS AERONAUTICS COMMISSION, et al.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

Respondents' brief opposing the grant of certiorari is directed to two points: (1) the claim that neither the Civil Aeronautics Board nor this Court has jurisdiction of this case because under the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.* and decisions of this Court the air service in question is wholly intrastate; and (2) the claim that even if the first point is wrong, there are no important reasons for this Court to become involved in the dispute between the nationally certificated air carriers and the State Commission.

I. THE SUPREME COURT HAS NEVER ADDRESSED THE ISSUES PRESENTED BY THIS CASE.

As to the first point, to the extent that the cases cited in Part I of Respondents' brief are relevant at all, they merely establish that this Court has not up to now addressed the issues raised by this petition. Thus, *United Air Lines v. Public Utilities Commission of California*, 342 U.S. 908 (1952), *Public Utilities Commission of California v. United Air Lines*, 346 U.S. 402 (1953) and *Western Air Lines v. California*, 348 U.S. 859 (1954) were all cases in which this Court could have spoken to the issues here raised but chose not to do so. The result of these cases was to sustain orders of the California Public Utilities Commission. Subsequently, however, the Supreme Court of Nebraska struck down an order of the Nebraska State Railway Commission prohibiting abandonment of an intrastate route by a CAB certificated carrier on the ground that such order would interfere with Congress' "general plan to regulate aviation"; *Frontier Airlines, Inc. v. Nebraska Department of Aeronautics*, 175 Neb. 501, 122 N.W. 2d 476 (1963).

In the case closest to the present one, in that it involved the *impact* on interstate transportation of flights wholly within one state, the Ninth Circuit Court of Appeals reversed the dismissal of a complaint brought by the CAB against a carrier serving only points in California, and directed the trial court to make specific findings as to whether the carrier's operations had sufficient impact on interstate air transportation to come within the jurisdiction of the CAB. *Civil Aeronautics Board v. Friedkin*

Aeronautics, 246 F. 2d 173 (9th Cir., 1957): The case was subsequently settled (at least temporarily) on the basis of an agreement by the carrier, Pacific Southwest Airlines, to discontinue certain practices thought to have had interstate impact. *Western Airlines, Inc. v. Pacific Southwest Airlines*, CAB Order No. E-19655 (1963).[1]

Respondents' further argument that there is no federal jurisdiction as a matter of law because Air Southwest would operate solely within Texas, is irreconcilable with *Friedkin*, *supra*, and not in accord with the CAB's view of its authority.

> "'The Board * * * interprets the [Federal Aviation] Act in a way which makes effective economic regulation under the statute possible by bringing within the regulatory scheme all those who compete in the business of offering air transportation to the public generally'". Reg. ER-574, Part 298, 34 Fed. Reg. 7124, 7126, quoting *Las Vegas Hacienda, Inc. v. CAB*, 298 F. 2d 430 at 434 (9th Cir., 1962), *cert. den.* 369 U.S. 885 (1962)

It is, of course, possible to distinguish or to attempt to reconcile all of the above cases; it is possible also to draw analogies with or point to differences in the railroad cases and tax cases cited in Respondents' brief. Doubtless, more detailed discussion of these cases will be appropriate in a brief on the merits. For present purposes the point is that state legislatures, state regulatory commissions, local airlines, national airlines, and the CAB are all grappling with

[1]Interestingly enough, under date of October 27, 1970, Pacific Southwest Airlines applied to the CAB for a new exemption permitting the activities prohibited by the settlement order, in part on the ground that the California Public Utilities Commission regulates its activities.

the problem of the relation between intrastate and interstate air transportation, and this Court has up to now given them no guidance.

II. THE ISSUES PRESENTED ARE OF MAJOR IMPORTANCE

A. *State Regulation of Air Transportation Is Growing Rapidly*

Respondents suggest that the present case is an isolated one of no major importance. In fact, 40 of the 50 states presently have regulatory commissions authorized by state law to regulate "intrastate" air transportation. As of two years ago, 27 state commissions had issued certificates of convenience and necessity or permits such as the one at issue in the present case; 24 state commissions had passed on discontinuance of service over particular routes or segments of routes, such as are at issue in the *Allegheny* case discussed below; 20 state commissions had prescribed rates; and 17 state commissions had prescribed or approved schedules. The extent to which the statutes creating the state commissions or purporting to give them jurisdiction over civil aviation exclude control of or impact on CAB certificated carriers varies from state to state. See National Association of Regulatory Utility Commissioners, *1968 Report of the Committee on Motor and Air Transportation* Appendix B.

Two currently pending cases illustrate the permanence of the problem in the absence of Supreme Court guidance. In Pennsylvania, the Public Utility Commission ordered Allegheny Airlines, a CAB certificated carrier, to continue

service between two Pennsylvania points, which its federal certificate permitted it to abandon. Following litigation before the Commission, the order was made final, a penalty of $5,000 was assessed, and Allegheny was ordered to reinstate the service within 30 days or file for a permit to discontinue service in accordance with the state commission's procedures. Allegheny thereupon brought an action in the United States Court for the Eastern District of Pennsylvania to enjoin the Commission from attempting to control its nationally regulated patterns of service. *Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission, et al.*, Civil Action No. 69-2148 (E.D. Pa.). The Civil Aeronautics Board has recently moved to file a brief as amicus curiae in support of its claim of paramount jurisdiction over Allegheny's routes and services even though the specific points in question are within a single state.

In the second case, the Civil Aeronautics Board recently permitted Western Airlines to suspend service between certain points in Alaska and permitted another carrier, Wien Consolidated Airlines, to serve the same points pending completion of the *Alaska Service Investigation*, CAB Order No. 70-7-113 (July 23, 1970). The Alaska Transportation Commission granted the same authority to Wien, but only until December 31, 1970, and opened its own investigation of service between Alaskan points. Docket No. 70-449. Some carriers — for example, North Air Inc. — are parties only to the state proceeding, while some, like Western, are parties only to the federal proceeding. The CAB has been invited to participate in the state proceeding but, under its normal practice, is expected to decline.

Whether the routes are purely intrastate and thus beyond the reach of the CAB, or are segments of larger routes with impact on the national system remains to be determined — with the possibility of inconsistent results being reached in simultaneous proceedings.

B. *The CAB has not Expressed Lack of Interest in this Case.*

The Respondents seek to buttress their argument that this case is isolated and not important by stating that the Civil Aeronautics Board did not respond to service of the original application before the Texas Aeronautics Commission in 1967. The clear reply to this is that the CAB does not as a matter of practice participate in state commission hearings; in fact, the contrary is true: state commissions, cities and chambers of commerce regularly appear and present evidence in CAB proceedings. In any event, silence by a large government organization in response to a paper received by some staff member before the scope of the case is at all clear cannot possibly have any substantive significance. Former Chairman Crooker of the CAB made this very point to the Supreme Court of Texas. (Petition for Certiorari App. H4). Rather than rebutting the point, which is impossible, Respondents attempt to impugn Chairman Crooker's motives. Petitioners, having no knowledge of the former Chairman's motives, suggest that if the point seems important a simple solution to this question would be to ask the CAB, through the Solicitor General, to describe its procedures with respect to receipt of copies of state regulatory papers and to comment on what significance, if any, should be attributed to its silence in this case.

CONCLUSION

Respondents' attempt to assert that the issues in this case have been foreclosed by prior decisions are without merit. The issue of state-federal relations raised by this case are difficult and unresolved, and ever-growing in importance.

For the reasons stated, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

CLARK, WEST, KELLER,
SANDERS AND GINSBERG,
2424 First National Bank
Building,
Dallas, Texas 75202,
Of Counsel,

W. B. West III
2424 First National Bank
Building,
Dallas, Texas 75202,
Counsel for Petitioner
Braniff Airways, Inc.,

CLARK, THOMAS, HARRIS,
DENIUS AND WINTERS,
MARY JOE CARROLL,
P. O. Box 1148,
Austin, Texas 78767,
Of Counsel,

Edward A. Clark
12th Floor Capitol National
Bank Building,
P. O. Box 1148,
Austin, Texas 78767,
Counsel for Petitioner
Trans-Texas Airways, Inc.,

CLARK, WEST, KELLER,
SANDERS AND GINSBERG,
2424 First National Bank
Building,
Dallas, Texas 75202,
Of Counsel,

George Allen Butler
2424 First National Bank
Building,
Dallas, Texas 75202
Counsel of Record
Counsel for Petitioner
Braniff Airways, Inc.,

McGINNIS, LOCKRIDGE,
KILGORE, BYFIELD,
HUNTER AND WILSON,
900 Congress Avenue,
Austin, Texas,
Of Counsel.

James W. Wilson
900 Congress Avenue,
Austin, Texas 78701,
Counsel for Petitioner
Continental Airlines, Inc.